UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WILMINGTON FABRICATORS, INC.,
DEBTOR-IN-POSSESSION

and

TEAMSTERS LOCAL 829, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS — Cases 1–CA–30434, 1–CA–31010

and

RODNEY VALLADARES, An Individual

WILMINGTON FABRICATORS, INC.

and

DANILO A. GUZMAN, An Individual — Cases 1–CA–32169, 1–CA–32170

and

TEAMSTERS LOCAL 829, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Thomas J. Morrison, Esq.,
of Boston, MA,
for the General Counsel.
Philip G. Boyle and Nereyda F. Garcia, Esqs.,
of Boston, MA,
for the Respondent.

DECISION

Statement of the Case

RICHARD H. BEDDOW, Administrative Law Judge. This matter was heard at Boston, Massachusetts on October 3, 1994 and September 30, and October 1 and 2, 1996. The proceeding is based upon an initial charge filed July 30, 1993, by International Brotherhood of Teamsters Local Union No. 829, AFL-CIO (Union or Local 829) against Wilmington Fabricators, Inc. of Wilmington, Massachusetts. The Regional Director's consolidated complaint dated April 30, 1996, alleges that Respondent violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act by threatening to deny employees overtime, by denying Felipe Collazo the opportunity to work overtime, by failing and refusing to recall Estervina Sanchez from layoff, by discharging Danilo A. Guzman from employment, and by failing to notify the Union of its

intentions and failing and refusing to recall laid off employees, because of their union or other protected concerted activities.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is engaged in the manufacture, distribution and sale of fabricated metal work stations and related metal furniture and fixtures. It annually ships goods valued in excess of $50,000 from its Wilmington location to points outside Massachusetts and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Massachusetts. It admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Sections 2(2), (6) and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

The Respondent has been owned by Paul Winchell and his family since 1969. It has experienced periods of success and growth but also suffered major setbacks. The company has changed course, reduced or redirected its operations, as needed, and survived a bankruptcy from which it was discharged in November, 1993.

On two separate occasions before 1990, it laid off a significant portion of its workforce. The first layoff was in 1985, and approximately one half of its 70 employees were laid off when it began to fabricate another product line that required employees with different skill sets. In 1989, 4 out of the remaining 25 to 30 employees were laid off and not recalled after a crucial machine broke down.

In the spring of 1990, the Bank of New England called a note and froze all the funds in a company account that was not designated a payroll account and Winchell met the payroll from his personal funds, which effectively wiped out his savings and, as he believed he could not meet future payrolls, the company laid off 12 out of approximately 25 employees, only three of whom were later recalled.

In early 1992, Louis Coiro was the supervisor of fabrication and Wally French was the supervisor of final assembly. Respondent employed about 30 employees, of whom 19 were Hispanic employees. At that same time employees Danilo Guzman and Rodney Valladares began to speak about the need for a union among themselves and with other employees, including Sergio Almonte and Teofilio Vidale Morales. In March, Valladares called the Union and spoke with Dan McLaughlin, the secretary treasurer, and as a result of this call, Arthur Lazazzero, a union business agent since January 1992, met with some of the Wilmington employees. The meeting took place in late March or early April 1992 at the Valladares home and approximately 15 hispanic employees attended.

The second meeting took place prior to April 10 at the home of Sergio Almonte and was attended by about 17 employees, again all of them were Hispanic. Employees signed union authorization cards or took blank union authorization cards back to Respondent's facility. Thereafter the Union filed a Representation Petition on April 10, 1992 and the parties signed a

Stipulated Election Agreement on April 24, 1992. After the petition was filed, and before the election, Respondent engaged in a vigorous antiunion campaign which included antiunion literature and meetings with employees in which Winchell said, among other things, that he would oppose the Teamsters with all the strength that he had, that a union was the worst thing that could happen to a company, and that employees would be without work and lose their jobs.

An election was held on June 11. Of about 28 eligible voters, 17 votes were for the Union and 11 votes against. On June 22, 1992, the Union was certified as the representative of Wilmington employees.

After the election, and continuing through September 1992, Respondent hired several new, non-hispanic employees including Chris Sullivan and James Pitman on June 15, Henry Bagrowski on July 9, Mike DiRocco on July 15, Eugene Smith on July 22, Robert Silva, and Alex Caporizzo on August 25, and Laura Michalski on September 8.

After the election Union agent Lazazzero visited Respondent's facility with a notice to post about a Union meeting and spoke with supervisor French. French accompanied him to the time clock area where Lazazzero spoke with about five employees, all of whom were Hispanic. Later, when Lazazzero returned Respondent's facility, he was met by French and told that he could not come onto the property. French said that Winchell had been upset over the fact that he had been allowed into the plant earlier. Lazazzero then met with about 15 hispanic employees off the property but in the immediate area of the facility, while French watched. On June 30, Felipe Collazo was made Union steward and he thereafter distributed union dues and membership cards at Respondent's facility. He spoke with French about giving the documents out and was told that he could do it during breaks.

Employee Almonte testified that immediately after the election, he questioned supervisor Coiro about why the Respondent had taken away his right to work overtime and that Coiro told him that Winchell had said that Almonte, Collazo, and others would not work anymore overtime because they had brought the Union in. Aquiles Cabrera also testified that he approached Coiro and asked about working overtime and Coiro said that those that had voted for the Union would not get overtime. Collazo testified that between June 30, 1992, when he was made steward, and July 16, 1992, when he was out of work because of an on the job injury, he asked Coiro about overtime and was told that nobody was working overtime. He also said that as steward, he attended one negotiating session in July 1993 where one of the issues raised concerned the pay rate of Estervina Sanchez. After the election, Sanchez had told Union agent Lazazzero that she thought she was being treated unfairly. Sanchez had been employed by Respondent since January 1987, as an electrical assembler and was paid $6.75 per hour. Paul LeMay had been employed since March 1992 in same classification but was paid $8.50 per hour. When Lazazzero brought the subject up at negotiation the company explained that although Sanchez and LeMay did the same work, LeMay handled heavier products.

In February 1993, the Respondent settled a number of Complaints before the Board. The complaint were based on unfair labor practice charges filed by, among others, the Union and Collazo and involved, in part, an allegation concerning the assignment of overtime and the settlement included a back pay remedy of approximately $35,000.

In March 1993, Almonte again approached supervisor Coiro and asked him why he no longer worked overtime and Coiro told him that they could not work overtime because of Winchell's instructions. Morales and Collazo confirmed that Almonte immediately told them what Coiro had said. After Coiro's statement, Collazo did not receive any overtime, although some other employees did. Specifically, between January 1993 and September 1993 Pat

Ferullo (who had a welding job classification) worked about 190 hours of overtime. Collazo had returned from a work related injury in December 1992 and was on light duty through February 1993, when he was able to return to his regular duties. At the time, Collazo was primarily a welder; however, he assertedly was capable of performing most, if not all, of the job functions at Respondent's facility.

In June and August 1993, the Respondent failed to get major contracts that it had expected and as a result, it decided to lay off employees. It determined that it would keep those employees who had been cross trained and had multiple skills and it planned to retain both Collazo and Ferullo, having them split the welding functions even though there was not enough welding work for two. Ferullo immediately quit, however, leaving Collazo to work full time.

By letter dated September 13, 1993, the Respondent informed the Union that it was laying off employees effective September 15. The letter indicated that the lay off would extend through the week and that about 20 employees could expect a three day layoff during the next three weeks. It specifically identified five employees that would not be laid off, it including Collazo. Winchell testified that Collazo was not laid off because Respondent did not want any trouble from him. The letter, which was delivered to Lazazzero, also stated that the bargaining unit employees would be recalled. Lazazzero testified that he did not call the Employer because he understood that the lay off would be temporary. Although Winchell said he anticipated that the layoff was going to be short term, many employees were not recalled and the Respondent did not notify the Union that the layoff would be extended indefinitely. Among those laid off were new employees Larry Copans, Laura Michelski, and Dick Kenneally, however within a matter of weeks, they were recalled. Otherwise, the Union did not respond to the layoff notification and it never requested to bargain about the matter.

Alexander Caporizzo and Estervina Sanchez, both light assemblers, were laid off. Caporizzo was a part time employee who had less seniority than Sanchez (he was not an employee at the time of the election in June 1992) and Sanchez had trained Caporizzo. In October 1993, Caporizzo was recalled. Winchell stated that Caporizzo was recalled to do light housing assembly because there was only enough work for a part timer and that Sanchez was not recalled because she could not work in the light assembly area because of the weight and bulk of the products being manufactured. He also said that Sanchez would have cost the Employer more because of health insurance. During the investigation of the charge in case 1–CA–31010, Winchell gave a sworn affidavit in which he stated that supervisor William Dorris was building light assembly work at home. In his testimony, however, Winchell said that William Dorris was not performing light assembly work at home but was taking them home where his wife performed the work. Winchell also said that even considering this work, there would not have been enough work for Sanchez. Theresa Dorris continued performing light assembly work, the type work primarily done by Sanchez, through at least April 1996.

Guzman was employed by the Employer from about June 6, 1988 until his discharge on about August 1, 1994. He was capable of doing most of the jobs in the Employer's facility, had developed multiple skills, and was not laid off in September 1993 because of these factors. He also worked extensive overtime. On June 21, 1994, employees Guzman, Cabrera, and Collazo were in an automobile accident. After the accident, all of them went to Lawrence General Hospital. While Collazo and Cabrera worked the next day, Guzman did not. Guzman went to the hospital, had various tests done, and saw a chiropractor. The next day, however, both Collazo and Cabrera left work because they did not feel well. On June 23, Guzman and his daughter went to the Employer's facility and Guzman's daughter gave a note from the chiropractor to the Employer. The note stated that Guzman was being treated for an injury and

could not return to work. With some small variation, Collazo and Cabrera did the same thing. Each of them received a note from the company, dated June 23, which stated that before they could return to work they needed a note from their physician stating that they could do their job. By letter dated June 28, the Company contacted Guzman's chiropractor, stating that Guzman would need a note before he could return to work. Neither the June 23 note to Guzman nor the June 28 letter from the Employer to the chiropractor said anything about contacting the company periodically to report his status but Guzman saw his chiropractor weekly and, weekly sent information about his physical status to the Employer. Guzman also told Cabrera that he was sending these reports to the Respondent.

On July 25, Cabrera and Collazo returned to work. One week later, on August 1, Guzman, received medical clearance to return to work and attempted to return. He testified that he gave his clearance note to supervisor Coiro, but Coiro told him that there was no work for him and, according to Guzman, "brushed him off." Guzman attempted to involve Collazo and have him intervene with Coiro, but Coiro ignored these attempts.

Cabrera had been recalled on January 10, 1994. Thereafter, Respondent did not recall any of the other employees who had been laid off in September 1993, however, hiring of new employees began when it hired Sean Riddell in September 1994, Ian Batchelder in October 1994, and Michael May and Mark Celata in November 1994, as regular full time employees. None of these four individuals had been employed by Respondent prior to their hire in late 1994 and the Respondent did not notify the Union of its actions.

III. Discussion

These proceedings arose after a contested election was conducted and the Union won certification as the exclusive collective bargaining representative of a unit of Respondent's employees on June 22, 1992. A review of the circumstances at the time of the election in June clearly establishes Respondent's knowledge of employee union activity and antiunion animus. At the time of the election, there were 30 employees in the Unit, of whom 19 were Hispanic and 11 were non-Hispanic. Prior to the election, the Union held a number of organizing meetings that were attended by only Hispanic employees and the Respondent was aware of the Union activity prior the second organizing meeting being held and well before the Representation petition was filed. Respondent immediately began a campaign designed to frustrate and defeat the Union. After the election, the Union representative met with Hispanic employees at Respondent's facility and was observed by Respondent. The number of votes cast against the Union in the election was identical to the number of non-Hispanic employees employed at the time of the election, the hires made after the election were non-Hispanic, and under these circumstances, I agree with the General Counsel's contention that these facts support the inference that Respondent concluded that the employees that supported the Union were Hispanic.

The Respondent and the Union engaged in limited bargaining negotiations but did not succeed in reaching any agreement. Otherwise, the Respondent's antiunion animosity did generate conduct which resulted in a number of changes of alleged unfair labor practices that substantially were resolved by a settlement agreement, however, several other complaint allegations survived and are the subject of this proceeding. These issues concern threats and denial of overtime opportunities, failure to recall one employee from layoff the discharge of one employee, and a general failure to recall laid off employees. Otherwise, as pointed out by the Respondent, the Union did not seek to bargain about the layoffs and recall. Moreover Collazo, the Union steward testified that he communicated with Lazazzero approximately three times per month from the time of the layoff until early 1994, and during that time period, Collazo told

Lazazzero about the hiring of temporary and subcontract employees, including Mrs. Dorris. Collazo, as steward, never requested bargaining on any matter connected to the layoff or to the recall of laid-off employees. Sometime after January, 1994, Lazazzero and Collazo stopped speaking and it appears that Lazazzero and the Union simply gave up making any efforts for the bargaining unit.

A. The Overtime Issues

A Employees Almonte and Cabrera both testified that in 1992, shortly after the election, supervisor Coiro said to them that those who had voted for or brought in the Union would not get overtime. Coiro, on the other hand, gave credible testimony that he had surgery and was not at the company between mid June and mid August and I credit his denial of his participation in any conversation in which he made the alleged remarks. He also denied making any similar statement to Almonte in March 1993 and further explained that he does not speak more than a few words of Spanish, that Almonte and Cabrera probably understand only 20 percent of what he says in English and that he communicates with them by showing them what he wants or by having Collazo act as a translator. When Almonte testified about the March 1993 conversation he said only that Coiro said they could not work overtime because of Winchell's instructions and responded "no" to the General Counsel's question of what if Coiro said "what you should do if you didn't like no overtime?" He then changed his answer to yes after reviewing his affidavit.

Almonte said he understood (spoken) English "but not very much", but could read English a lot. He also said he understood what Coiro said in English about overtime. Under these circumstances, it is not clearly established that Almonte correctly understood all of what Coiro might have said and I find credible only that in March 1993 Coiro said the employees could not work overtime because of Winchell's instructions and I find no direct credible testimony that Coiro said anything in March 1993 about union involvement as it related to the overtime situation. Accordingly, I find that the General Counsel has failed to show a violation of Section 8(a)(1) in this respect as alleged in the complaint.

Although the record shows that Collazo became Union steward, it otherwise shows that the Respondent specifically avoided selecting him for layoff for that same reason and I find no credible reason to indicate that he was denied overtime because of his status. There is no credible evidence that Coiro made any statement linking Collazo to a denial of overtime. Otherwise, the Respondent's records and Winchell's testimony show that there had been a generally company wide reduction in overtime at the time Collazo returned to work in February on light duty from an injury that caused several months absence from work. The evidence shows that morning overtime was cut entirely, other overtime was reduced, and the use of overtime was limited to certain job categories such as press brake (a metal forming machine), paint line, and final assembly. Although Pat Ferullo (classified as a welder, as was Collazo) did work overtime in 1993, he worked this overtime in the press brake area, not welding, and I find that the Respondent has shown that it had legitimate business reasons for reducing overtime and for selecting Ferullo, not Collazo for some of the limited overtime. I find that the non-selection of Collazo for overtime would have occurred in this manner regardless of Collazo position as Union steward or the Union's certification as bargaining representative based on the support of its hispanic employees, see the *Wright Line* analysis, *infra,* and I conclude that no violation of Section 8(a)(1) and (3) is shown as alleged.

B. Discharge of Danilo Guzman

In proceedings involving changes in conditions of employment and disciplinary action against employees, applicable law requires that the General Counsel meet an initial burden of

presenting sufficient evidence to support an inference that the employees union or other protected concerted activities were a motivating factor in the employer's decision to change their conditions of employment or to discipline them. Here, the record shows that the Respondent was aware of the employees' union activity. The credible evidence also supports an inference that it was aware that the hispanic employees had attended Union meetings and that all were supporters of the Union. The Respondent also engaged in a strong antiunion election campaign and engaged in other conduct, most specifically the unrebutted statement by supervisor French to Union representative Lazazzero after the Union was certified that Lazazzero could not come on the property and that owner Winchell was upset that French had allowed it earlier, which clearly shows union animus attributable to the company owner.

As noted by the Court in *Town & Country Electric v. NLRB*, F.3d decided Feb. 5, 1997 (8th Cir.) — an ALJ may properly use an employer's attitudes about unions as one factor in evaluating the credibility of the employer's witnesses and drawing inferences regarding the employer's motive. See *York Prods. Inc.* 881 F.2d at 546; *Ballou Brick Co. v. NLRB,* 798 F.2d 339, 342 (8th Cir. 1986); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969).

Under these circumstances, I draw such an inference and find that the General Counsel has met his initial burden by presenting a prima facie showing sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to not recall laid off employees and to terminate Guzman. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line, A Division of Wright Line*, *Inc.*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.,* 103 S. Ct. 2469 (1983), to consider Respondent's defense and whether the General Counsel has carried his overall burden.

As pointed out by the Court, in *Transportation Management Corp.*, supra:

> an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected concerted activity.

Here, the record shows that Guzman was a valued and long term employee, however, he was one of the initiators of the effort that brought in the Union and he attended Union meetings and voted in the election. After being injured in the same car with Union steward Collazo and Cabrera in an automobile accident on June 21, Guzman initially notified Respondent about his condition on June 23 and thereafter informed the Employer about his status. When he was medically cleared to return to work on August 1 he got his paperwork, returned to Respondent's facility and was refused employment.

The Employer claims that Guzman was terminated because he violated an unwritten rule concerning absenteeism. Guzman was not aware of any such rule and it is clear that the Respondent, in its correspondence with Guzman after the accident, made no mention of this rule and the company's correspondence to Guzman, as well as its note to his chiropractor seem only to be concerned with his ability to perform his job duties. Here, the mere fact that the Respondent did not discharge or act against a more prominent Union supporter (Steward Collazo) with whom Guzman rode in the same car pool is irrelevant, especially since they followed slightly different procedures in notifying the Company. Guzman testified that he mailed material to the company (in a postal service mail box) which raises a presumption of delivery. Although the Respondent claims it didn't receive this information, it was aware that his daughter had come to the Respondent and delivered a note from a doctor of chiropractory saying he was being treated and was unable to return to work and needed to be reevaluated in a week.

Winchell testified that Guzman was terminated because the company didn't "know what happened to this guy, he just vaporized for about a month and we didn't hear anything. We consider, and she wrote on her form to the Unemployment Board, that he had abandoned his job by not keeping us informed as to what was going on."

In fact, Guzman obtained a clearance from his chiropractor dated July 28 and he attempted to return on Monday August 1 but found that his time card had been removed. He went to supervisor Coiro and testified that he gave him the doctor's note but that Coiro said "you don't have any more work" -- "Winchell said that you don't have any work." Winchell, however, testified that Coiro asked for a medical slip but Guzman didn't have one. Coiro testified that he asked for a slip but that Guzman never gave him a paper and that he did not remember if Guzman said anything in response to his demand. Coiro did not indicate that he made any effort to have his remarks in English to Guzman translated to Spanish but did testify that he said:

> "you can't come back to work because you need a letter from your doctor because you've been out on an injury and you can't come back without a doctor's note so that we can put you on the proper work.

Coiro admitted that he was aware that the several employees had been in an accident and he reluctantly admitted that he "probably" had conversations (that he didn't remember), with Winchell (but not at any length), about Guzman status prior to August 1.

Then, with out any further attempt to communicate with Guzman after he attempted to return, the Respondent then proceeded to invoke its unpublished rule and without any further warning, request for compliance, or inquiry about Guzman's understanding of what was required, it simply ended his employment.

At one point Guzman and owner Winchell were the only two people in the plant trained and able to operate one major piece of machinery. Coiro testified the he and Winchell probably discussed Guzman's status, yet nothing was done to insure that Guzman understood what was supposedly required of him. I am not persuaded that the Respondent would have taken such a cavalier approach to Guzman's termination when it clearly knew he had attempted to return to work on August 1. Instead of helping to clarify his status, it seized upon the opportunity to diminish the number of hispanic union supporters remaining in the plant and abruptly ended his long term employment with the company.

I find that Respondent claim that it never received certain communication from Guzman is unlikely and I do not credit Coiro's denial in this respect, however, it does not affect the ultimate conclusion herein. Moreover, the fact that Guzman sought unemployment compensation when he understood he couldn't come back to work provides no presumption or excuse for the Respondent's actions and I conclude that the Respondent has failed to show that it would have acted in this extreme manner with Guzman even in the absence of the union activities by Guzman and the other hispanic employees. Accordingly, I find that the General Counsel has met his overall burden and has shown that Guzman's termination violated Section 8(a)(1) and (3) of the Act, as alleged.

C. Failure to Recall Estervina Sanchez

Estervina Sanchez and Alex Caporizzo held the same job and were laid off on September 15, 1993. On October 1, only Caporizzo was recalled. Sanchez was an Hispanic employee who had attended Union meetings both before and after the election and she voted in the election. She also approached the Union about a pay problem and the Union raised that issue with the Employer at negotiations and also filed an unfair labor practice charge on her behalf. Accordingly, I find that Sanchez was both generally and specifically identified as a Union supporter. Moreover, I credit her testimony that on one occasion supervisor Coiro told her to go to the Union for more money when she inquired about her pay rate.

Although she was not recalled, the Respondent recalled a less senior non-hispanic employee (who had been trained by Sanchez and was not employed at the time of the election). Both were electrical assemblers, however, the Respondent offered contradictory reasons for its failure to recall Sanchez. At the hearing, Respondent claimed that the work was either too heavy or bulky for her and that her health insurance costs as a long term employee would have been prohibitive. During the investigation of the charge the Respondent offered a different set of reasons, including the possibility that there was not enough work for her and that she got more money on unemployment compensation than she would get for part time work. Moreover, the Respondent denied the fact that Teresa Dorris the wife of a supervisor, was doing light assembly work at home, work on the same type of units that Sanchez was most capable of doing. The Respondent's assertion that Sanchez lacked multiple skills and could not handle anything other than small assemblies is unpersuasive. Sanchez testified that she wired and picked up lamp units of 25 or 30 pounds and also sometime had done packing in addition to assembly of power strip units.

Here I find that the Respondent has pretextually downgraded Sanchez abilities as compared to the less senior non-hispanic employee it recalled and it essentially avoided any duty to recall her to a full time position by expanding its apparent use of a supervisor's wife as a home subcontractor. These circumstances do not constitute a persuasive showing that the Respondent would have taken the same action in the absence of Sanchez's use of the Union to plea for fair and equal wages and the other generalized union activities of the hispanic workers and I conclude that the Respondent has failed to meet its burden in this respect and I find that the Respondent's abandonment of Sanchez after her layoff and its failure to recall her from layoff was discriminatorily motivated and would not have occurred but for the protected union activity. Accordingly, I find that it violates Section 8(a)(1) and (3) of the Act, as alleged.

D. Failure to Recall and Bargaining

The record shows that Respondent laid off a majority of the employees represented by the Union in September 1993. Respondent notified the Union of the lay off two days before the lay off became effective; the notification indicated that the lay off was going to be of short duration and that employees would be recalled as economic conditions allow. While approximately five employees were recalled, the last employee recalled was Aquiles Cabrera in January 1994. No employees were recalled after this date, however, some workers were obtained through the service of a temporary employment agency and then, between September and November 1994, the Respondent hired four new regular full time employee. Respondent did not notify the Union that it was going to end the recall of the laid off employees.

The Respondent's last communication with the Union was sent on December 10, 1993, and it indicates that a unit employee is taking leave and his position will be temporarily filled by a supervisor and that Mike Direco would be recalled. The Union's failure to respond could allow the Respondent to infer that the Union acquiescence with its proposed action but the failure to

respond to this correspondence or the September layoff notice is insufficient to show that the Union has abandoned the Unit.

The specific matter of recall of employees from lay off is a mandatory subject of bargaining. *Quality Packaging Inc.*, 265 NLRB 1141, 1149 (1982), and it is clear that Respondent never notified the Union of its decision to stop the recall of laid off unit employees. The Union was not given an opportunity to bargain about the decision or effects of Respondent's refusal to recall laid off employees and the Union was not notified that the Respondent was changing its originally communicate plan for recall of employees as economic conditions allow.

Except as discussed above regarding employee Sanchez, the Respondent offers no legitimate reason for its failure to recall unit employees and the record is devoid of probative evidence establishing any lawful business reason for Respondent's failure to recall unit employees. Under these circumstance, and in light of the overall record, it is clear that the failure to recall is a further manifestation of Respondent's antiunion motivation and, accordingly, I find that its actions in this respect also are shown to violate Section 8(a)(1)(3) and (5) of the Act, as alleged.

Lastly, it is noted that the general charges related to failure to recall were filed in October 1994 shortly after the first regular full time employee was hired in September and there was no intervening notice from the Respondent after the last laid off employee was recalled in January 1994. I find that this event triggered the Section 10(b) period and the charge therefore was timely. Moreover, I find that the amended April 1996 charge is "closely related" to the factual situation and theory of timely change, see *Redd-I Inc.* 290 NLRB 1115 (1988), and I reaffirm my acceptance of the amended complaint.

IV. Conclusions of Law

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Danilo A. Guzman on August 1, 1993, and failing and refusing to recall Estervina Sanchez from layoff because of their union or other protected activity, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By hiring new employees and failing and refusing to recall laid off employees or to notify the union of its changed plans in September 1994 and thereafter, Respondent has violated Section 8(a)(1), (3) and (5) of the Act.

5. Except as found herein, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

V. Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the necessary action, it is recommended that Respondent be ordered to reinstate employee Danilo A. Guzman, and to recall employee Estervina Sanchez and all other employees laid off in September 1993, who were discriminatorily denied recall, to their former jobs or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date or reinstatement in accordance with the method set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[1]

The Respondent also shall be ordered to expunge from its files any reference to Guzman's discharge and notify him in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel action against him. And, because the violations also involve Section 8(a)(5) of the Act, Respondent also shall be ordered to bargain, upon request, in good faith for a reasonable period of time with the Union as the exclusive bargaining representative of the Unit about terms and conditions of recalling Unit employees from lay off. Otherwise, it is not considered necessary that a broad Order be issued.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[2]

ORDER

Respondent, Wilmington Fabricators, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discriminatorily terminating or failing to recall any employee from layoff because of the employees engaging in union or other protected activities.

(b) Discriminatorily failing and refusing to recall laid off employees or failing to notify the Union of its planned actions.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, offer Danilo A. Guzman and Estervina Sanchez immediate and full reinstatement (or recall) and offer recall to all employees laid off in

[1] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

September 1993 who were discriminatorily denied recall and make them whole for all losses they incurred as a result of the discrimination against them, in the manner specified in the section entitled "The Remedy."

(b) Within 14 days from the date of this Order, expunge from its files any reference to Guzman's termination and within 3 days thereafter notify the employee in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against him.

(c) Within in 14 days of a request by the Union bargain in good faith with the Union about the terms and conditions of recalling unit employees.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Wilmington, Massachusetts, facilities copies of the attached notice marked "Appendix."[3] Copies of the notice in both English and Spanish on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. March 7, 1997.

_____
Richard H. Beddow, Jr.
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily terminate employees or refuse to recall them from layoff because of their engaging in a union or other protected concerted activities.

WE WILL NOT discriminatorily fail and refuse to recall laid off workers or to notify the Union of any such planned actions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order off Danilo A. Guzman and Estervina Sanchez immediate and full reinstatement or recall and offer recall to all other employees laid off in September 1993 who also were discriminatorily denied recall, and make them, whole for the losses they incurred as a result of the discrimination against them in the manner specified in the section of the Administrative Law Judge's Decision entitled "The Remedy."

WE WILL within 14 days from the date of this Order, expunge from our files any reference to the termination and within 3 days thereafter notify the employee in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against him.

WE WILL within 14 days of a request by the Union, bargain in good faith with the Union about the terms and conditions of recalling unit employees.

WILMINGTON FABRICATORS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, 6th Floor, Boston, Massachusetts 02222–1072, Telephone 617–565–6701.